Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 98-0117

In re: HAL TAYLOR,

Debtor.

STEPHEN W. RUPP, TRUSTEE,

Petitioner,

v.

JULIA TAYLOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit went beyond the limits and abused the powers of appellate review.

Whether the United States Court of Appeals for the Tenth Circuit erred as a matter of law in concluding that the determination of equitable property interests is a conclusion of law rather than an issue of fact.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. PORTIONS OF THE RESPONDENT'S STATEMENT OF BACKGROUND ARE UNSUPPORTED OR INACCURATE.

The Respondent's recitation of background is, in great part, unsupported or inaccurate. There are several references to "Tr." which are not a matter of the record on appeal to the United States Court of Appeals for the Tenth Circuit (hereafter "Court of Appeals") and not a matter of any appendix submitted to this Court.

The ninth, tenth and twelfth paragraphs of the Respondent's "Background" have no references to the record on appeal or an appendix and were not facts ever considered in this proceeding.

In several instances, the Respondent's statement of background is subtlety, but significantly, inaccurate. For example, the Respondent states, "There is one creditor with a claim of less than $30,000.00." This statement misstates the amount of the claim and the fact that Mr. Taylor scheduled only one creditor and omits administrative claims in the case.

II. THE DETERMINATION OF AN EQUITABLE INTEREST IN PROPERTY IS ULTIMATELY AN ISSUE OF FACT.

The determination of an equitable or beneficial interest in property is an issue of fact, not law. A close review of the

Court of Appeals' decision demonstrates just how fact intensive this issue is. Quoting selected and pertinent parts:

> "We may not set aside the bankruptcy judge's fact findings unless they are clearly erroneous . . . The appellate record does not contain a transcript of the testimony presented to the judge. . . We turn our attention first to whether the bankruptcy judge correctly imposed a 'resulting trust'.
>
> . . .
>
> "In reviewing this determination we must keep in mind that the proof required to impose a resulting trust 'must be strong, clear and convincing, such as to leave no doubt of the existence of the trust, . . . So viewed, there is no basis for the bankruptcy judge's determination that the facts rebut the presumption [of]. . . a gift . . . .As a practical matter, such a rule would prevent transfers. . . We are satisfied Harold's intention to continue to live with his wife on the premises and to pay a portion of the bills incurred during that occupancy does not establish clear and convincing proof of his intention to retain an ownership interest in property that he conveyed to his wife for estate planning purposes."
>
> . . .
>
> We turn next to whether the bankruptcy judge correctly imposed a 'constructive trust' . . .[T]he circumstances requiring imposition of a constructive trust must be found to exist by 'clear and convincing evidence'. . .[H]e [Harold] manifested no intent that his wife not

> have the legal and equitable title to the home. The fact that he paid real estate taxes, insurance and utility bills could certainly be seen as his contributing to the expenses in return for living in the home which she owned . . .[A]ny financial institution would require a consent or guarantee by a spouse of the title holder because of the spousal elective share and homestead exemptions law. . .There were no 'badges of fraud' in this case.
>
> . . .
>
> We thus reverse the finding that Harold Taylor had an equitable one-half undivided share in the Park City property." (Underlining added.) (App.10a-16a.)

From the Court of Appeals' decision, the following becomes evident:

(1) The Court of Appeals concluded that the determination of an equitable interest was dependent on finding either a constructive or resulting trust.

(2) The finding of a trust was dependent on clear and convincing evidence.

(3) Even though the record on appeal did not enable the Court of Appeals to review the evidence considered by the bankruptcy judge, the evidence, whatever it might have been and which was found by the bankruptcy court to be clear and convincing, was not clear and convincing in the opinion of the Court of Appeals.

(4) Though it had no record on appeal, the Court of Appeals made new findings evident from the statements underlined above.

The Court of Appeals overturned the bankruptcy judge on the grounds that the evidence found to be clear and convincing by the bankruptcy judge was not clear and convincing to the satisfaction of the Court of Appeals notwithstanding the Court of Appeals had no record on appeal to consider.

III. THE COURT OF APPEALS IGNORED THE FINDING OF MARITAL PROPERTY.

As fully discussed in the Petitioner's petition, the Court of Appeals ignored the bankruptcy judge's finding of marital property and relevant Utah law. Respondent attempts to distinguish the cases of *Hoagland v. Hoagland,* 852 P.2d 1025 (Utah App. 1993) and *Hogue v. Hogue,* 831 P.2d 120 (Utah App. 1992). Both of these divorce cases concerned the husbands' marital property interests in real properties which they had previously and intentionally deeded to their divorcing wives. In both cases, an award of a real property interest to the husband by the trial court was affirmed on appeal.

In attempting to distinguish these cases, the Respondent states, "In *Hoagland* and *Hogue*, the divorce court found the property to be marital property because it had been transferred to wives to avoid husbands' creditors. Thus, facts existed to avoid the transfers based upon fraudulent conveyance theories and resulting trust theories." This statement by the Respondent is inaccurate and misleading.

The trial courts did not determine the real properties to be marital properties because they had been deeded to the wives to avoid creditors or based on fraudulent conveyance or trust theories or claims. Pursuit of such claims would have been incongruous since a transferor cannot attack or impeach his own transfer as a fraudulent conveyance. These cases are purely marital property cases where the husbands asserted equitable, beneficial, marital real property interests and claims even though they had previously and purposefully transferred title to the real properties to their wives.

The only difference between the *Hoagland* and *Hogue* transfers and the Taylor transfer is the purported reason for the deed. In *Hoagland* and *Hogue*, the transfers were done to prospectively avoid creditors. In the present case the transfer was purportedly done for prospective estate and inheritance tax planning. In none of these cases is there any evidence of any present intent at the time of the deed to actually transfer property. In all three cases, the only change after the deed is the name on the title. To conclude that there was a transfer of any more than bare legal title is to elevate form over substance.

The need to address marital property interests is unavoidable when a bankruptcy case is filed by only one spouse. The bankruptcy estate includes all property interests, legal and equitable. This breadth includes marital property. Property of the bankruptcy estate of one spouse will virtually always include marital property in which the non-debtor spouse also has an interest. In essence, the bankruptcy filing by one spouse results in a financial or property divorce requiring a legal and equitable division of marital property between the bankruptcy estate of the debtor and the non-debtor spouse. There is no doubt that if Hal Taylor and Julia Taylor

divorced, Mr. Taylor would be entitled, under Utah law, to a fair share and interest in the Park City home.

The Court of Appeals improperly ignored the bankruptcy court's finding of marital property under Utah law.

IV. NEITHER UTAH HOMESTEAD EXEMPTION OR PROBATE LAW REQUIRED THAT HAL TAYLOR JOIN IN THE PLEDGE OF THE PARK CITY HOME.

Findings of fact by the bankruptcy court included the facts that both Hal and Julia Taylor were liable on, used, and made payments on a Line of Credit obtained in March of 1989, well after the transfer of title to Ms. Taylor. The Line of Credit was secured by a pledge of the Park City Home by both Taylors. The bankruptcy court considered this use and treatment of the Park City home one of many facts that exhibited Mr. Taylor's continuing equitable interest in the Park City home.

To excuse the pledge of the home by Mr. Taylor, the Court of Appeals and the Respondent argue that Utah homestead and probate laws compelled the lender to require that Mr. Taylor join in the pledge of the home to avoid jeopardy to the priority or standing of the loan against the home. This argument is flawed for the following reasons:

First, even if the law gave reason that Mr. Taylor join in the pledge of the home, this does not explain his incurring of the liability, his receipt of the loan proceeds, and his participation in the repayment of the secured Line of Credit. (App. 28a.)

Second, neither the Court of Appeals or the Respondent demonstrate in this case that the application of the homestead or probate laws would jeopardize the priority or standing of an enforceable, consensual lien to the lender.

Third, even if the laws did jeopardize an enforceable, consensual lien, there was no evidence that lenders require or that the lender in this case required the consent or guarantee of the spouse of the title holder. This finding by the Court of Appeals was unsupported supposition. The evidence might as likely have demonstrated that Mr. Taylor was willing to admit and pledge his ownership of the home in order to obtain the loan, nearly $30,000.00 of which was placed into the H.W. Taylor account. (App. 28a.)

In conclusion, the Court of appeals improperly, and well beyond its prerogative, drew its own finding of fact even though there was no evidence.

V. INTENT AT THE TIME OF THE TRANSFER CAN BE SHOWN BY CONDUCT AFTER THE TRANSFER.

The Respondent and Court of Appeals are critical of the fact that "the Bankruptcy Court used subsequent conduct to infer that Hal never intended to convey all of his property." The consideration of subsequent conduct is totally appropriate.

Section 443 of the *Restatement of Trusts 2d*, which concerns rebutting the presumption of a gift to a relative, states in Comment "a", "The conduct of the payor and of the transferee subsequent to the transfer, however, may be such as to show that at the time of the transfer the payor did not intend to make a gift to the transferee. Thus, the fact that the payor

manages the property, collects rents, pays taxes and insurance, pays for repairs and improvements, or otherwise asserts ownership, and the acquiescence by the transferee in such assertion of ownership, is evidence to rebut the inference of an intention by the payor to make a gift to the transferee."

Contrary to the Restatement, the Court of Appeals specifically found that the payment of real estate taxes, insurance and utility bills, cosigning and pledging the property to secure new debt or credit, payment of the debt secured by the property, and continuing to live in the property was not conduct sufficient to rebut a presumption of an absolute gift. This finding by the Court of Appeals is contrary to the Restatement and further demonstrates how the Court of Appeals drew its own findings of fact .

VI. THERE WAS NO EVIDENCE THAT A FINDING OF AN EQUITABLE INTEREST WOULD IMPAIR ESTATE AND INHERITANCE TAX PLANNING.

Whether a finding and declaration of an equitable property interest in a bankruptcy (creditor-debtor) case would impair estate and inheritance tax planning in this or any other case was never an issue. Admittedly, Hal Taylor did state that the transfer of title to the Park City home was for estate and inheritance tax planning. However, the issue is not the reason Mr. Taylor gave for the transfer, but whether, "As a practical matter such a rule would prevent transfers of title to the home between spouses to accomplish" estate and inheritance tax planning.

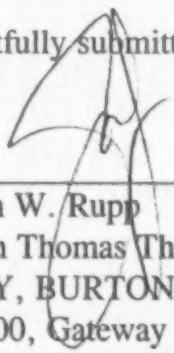
With that issue in mind, there was no evidence that, as a practical matter, a finding and declaration of an equitable

interest in a bankruptcy case would otherwise impair or prevent general estate or inheritance tax planning. Again, the finding of the Court of Appeals comes from no source in this case and demonstrates the appeal court's involvement beyond the scope of appellate review.

VII. CONCLUSION

The Court of Appeals, with no record on appeal, made new findings of fact concerning which no evidence was ever introduced, and ignored findings of the bankruptcy court, beyond the rules of appellate review. Review by this Court is needed to correct the error of law and the Court of Appeals' departure from the rules and limits of appellate review.

Respectfully submitted,



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